

77-535 STATUTES; ADMIN. RULES AND REGULATIONS; PROCEDURES

(b) The provisions of K.S.A. 77-522 and amendments thereto do not apply to conference hearings insofar as those provisions authorize the issuance and enforcement of subpoenas and discovery orders, but do apply to conference hearings insofar as those provisions authorize the presiding officer to issue protective orders at the request of any party or upon the presiding officer's motion.

(c) Paragraphs (a), (b) and (c) of K.S.A. 77-523 and amendments thereto do not apply; but (1) the presiding officer shall regulate the course of the proceedings; (2) only the parties may testify and present written exhibits; and (3) the parties may offer comments on the issues.

History: L. 1984, ch. 313, § 34; L. 1988, ch. 356, § 19; July 1, 1989.

77-535. Disclosure of material or essential facts. (a) If during a conference hearing the presiding officer has reason to believe that material facts are in dispute, the presiding officer may require any party to state the identity of the witnesses or other sources through whom the party would propose to present proof if the proceeding were converted to a formal hearing, but if disclosure of any fact, allegation or source is privileged or expressly prohibited by any provision of law, the presiding officer may require the party to indicate that confidential facts, allegations or sources are involved, but not to disclose the confidential facts, allegations or sources.

(b) If during a conference hearing a party has reason to believe that essential facts must be obtained in order to permit an adequate presentation of the case, the party may inform the presiding officer regarding the general nature of the facts and the sources from whom the party would propose to obtain those facts if the proceeding were converted to a formal hearing.

History: L. 1984, ch. 313, § 35; L. 1988, ch. 356, § 20; July 1, 1989.

EMERGENCY PROCEEDINGS

77-536. Emergency proceedings; use, when; procedure. (a) A state agency may use emergency proceedings: (1) In a situation involving an immediate danger to the public health, safety or welfare requiring immediate state agency action or (2) as otherwise provided by law.

(b) The state agency may take only such action as is necessary: (1) To prevent or avoid the immediate danger to the public health,

safety or welfare that justifies use of emergency adjudication or (2) to remedy a situation for which use of emergency adjudication is otherwise provided by law.

(c) The state agency shall render an order, including a brief statement of findings of fact, conclusions of law and policy reasons for the decision if it is an exercise of the state agency's discretion, to justify the state agency's decision to take the specific action and the determination of: (1) An immediate danger or (2) the existence of a situation for which use of emergency adjudication is otherwise provided by law.

(d) The state agency shall give such notice as is practicable to persons who are required to comply with the order. The order is effective when rendered. Notice under this subsection shall constitute service for the purposes of the act for judicial review and civil enforcement of agency actions.

(e) After issuing an order pursuant to this section, the state agency shall proceed as quickly as feasible to complete any proceedings that would be required if the matter did not justify the use of emergency proceedings under subsection (a).

(f) The state agency record consists of any documents regarding the matter that were considered or prepared by the state agency. The state agency shall maintain these documents as its official record.

(g) Unless otherwise required by a provision of law, the state agency record need not constitute the exclusive basis for state agency action in emergency proceedings or for judicial review thereof.

History: L. 1984, ch. 313, § 36; L. 1988, ch. 356, § 21; July 1, 1989.

Law Review and Bar Journal References:

"The New Kansas Administrative Procedure and Judicial Review Act," David L. Ryan, 34 J.K.B.A. 53, 57, 68 (1985).

SUMMARY PROCEEDINGS

77-537. Summary proceedings; use, when; right to request hearing; orders, contents. (a) A state agency may use summary proceedings, subject to a party's request for a hearing on the order, if:

(1) The use of those proceedings in the circumstances does not violate any provision of law; and

(2) the protection of the public interest does not require the state agency to give notice and an opportunity to participate to persons other than the parties.

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(b) The state agency shall serve each party with a copy of the order in a summary proceeding in the manner prescribed by K.S.A. 77-531, and amendments thereto. The order shall include at least:

(1) A statement of the state agency's action and, if unfavorable action is taken, a brief statement of the reasons for the action;

(2) notice of the time and manner for requesting a hearing on the order; and

(3) notice that, if a hearing is not requested, the order shall become effective upon the expiration of the time for requesting a hearing.

History: L. 1984, ch. 313, § 37; L. 1988, ch. 356, § 22; L. 1989, ch. 283, § 6; July 1.

Law Review and Bar Journal References:

"The New Kansas Administrative Procedure and Judicial Review Act," David L. Ryan, 54 J.K.S.A. 53, 57, 63 (1985).

77-538 to 77-540.

History: L. 1984, ch. 313, §§ 38 to 40; L. 1988, ch. 356, §§ 23 to 25; Repealed, L. 1989, ch. 283, § 26; July 1.

77-541. Same; record. (a) The state agency record for a summary proceeding consists of any documents regarding the matter that were considered or prepared by the state agency. The state agency shall maintain these documents as its official record.

(b) Unless otherwise required by a provision of law, the agency record need not constitute the exclusive basis for agency action in summary proceedings or for judicial review thereof.

History: L. 1984, ch. 313, § 41; L. 1988, ch. 356, § 26; L. 1989, ch. 283, § 7; July 1.

77-542 to 77-544. Reserved.

77-545. State corporation commission; adjudicative proceedings; ex parte communications; file and docket, contents; technical staff, not party to proceedings. (a) This section applies to adjudicative proceedings before the state corporation commission.

(b) (1) After the commission has determined and announced that a hearing should be held, and prior to the issuance of a final order, no parties to the proceeding, or their counsel, shall discuss the merits of the matter or proceeding with the presiding officer unless reasonable notice is given to all parties who have appeared to enable the parties to be present at the conference.

(2) After the commission has determined and announced that a hearing should be held,

prior to the issuance of a final order, copies of any written communications from any party regarding the proceeding that are directed to the presiding officer shall be mailed to all parties of record and proof of service shall be furnished to the commission. Communications requested by members of the commission staff from any party and any written communications received by members of the commission staff from any party shall be made a part of the file and the docket and shall be made available to all persons who desire to use them, provided that all commission requests for information from a party shall be mailed to all parties of record.

(3) The person or persons to whom any ex parte communication has been made shall promptly and fully inform the full commission of the substance of the communication, and the circumstances thereof, to enable the commission to take appropriate action.

(c) For purposes of this section, no member of the technical staff shall be considered a party to any proceeding before the commission, regardless of participation in staff investigations with respect to the proceeding or of participation in the proceeding as a witness. Since the purpose of the staff is to aid the commission in the proper discharge of commission duties, the presiding officers shall be free at all times to confer with any staff member with respect to any proceeding. However, no facts that are outside the record, and that reasonably could be expected to influence the decision in any matter pending before the commission, shall be furnished to any presiding officer unless all parties to the proceeding are likewise informed and afforded a reasonable opportunity to respond. Subsection (b) shall apply to staff counsel in regard to any adjudicatory proceeding before the commission.

(d) All letters and written communications that are received by the presiding officer from members of the general public, and that are in the nature of ex parte communications, shall be made a part of the file in the docket and shall be made available to all persons who desire to see them. The deposit of such written communications and letters in the file shall not make them a part of the official record of the case.

History: L. 1988, ch. 356, § 355; July 1, 1989.

77-546. Commissioner of insurance; adjudicative proceedings; ex parte communications; file and docket, contents; technical staff,

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not party to proceedings. (a) This section applies to adjudicative proceedings before the commissioner of insurance concerning any rate, or any rule, regulation or practice pertaining to the rates over which the commissioner has jurisdiction and adjudicative proceedings held pursuant to the Kansas insurance holding companies act.

(b) (1) After the commissioner has determined and announced that a hearing should be held, and prior to the issuance of a final order, no parties to the proceeding, or their counsel, shall discuss the merits of the matter or proceeding with the presiding officer unless reasonable notice is given to all parties who have appeared to enable the parties to be present at the conference.

(2) After the commissioner has determined and announced that a hearing should be held, prior to the issuance of a final order, copies of any written communications from any party regarding the proceeding that are directed to the presiding officer shall be mailed to all parties of record and proof of service shall be furnished to the commissioner. Communications requested by the commissioner's staff from any party and any written communication received by the commissioner's staff from any party shall be made a part of the file and the docket and shall be made available to all persons who desire to use them, provided that the commissioner's requests for information from a party shall be mailed to all parties of record.

(3) The person or persons to whom any *ex parte* communication has been made shall promptly and fully inform the commissioner of the substance of the communication, and the circumstances thereof, to enable the commissioner to take appropriate action.

(c) For purposes of this section, no member of the commissioner's technical staff shall be considered a party to any proceeding before the commissioner, regardless of participation in staff investigations with respect to the proceeding or of participation in the proceeding as a witness. Since the purpose of the staff is to aid the commissioner in the proper discharge of the commissioner's duties, the presiding officer shall be free at all times to confer with any staff member with respect to any proceeding. However, no facts that are outside the record, and that reasonably could be expected to influence the decision in any matter pending before the commissioner, shall be furnished to any presiding officer unless all parties to the proceeding are likewise informed and

afforded a reasonable opportunity to respond. Subsection (b) shall apply to staff counsel who have participated in the proceeding in regard to any adjudicatory proceeding before the commissioner.

(d) All letters and written communications that are received by the presiding officer from members of the general public, and that are in the nature of *ex parte* communications, shall be made a part of the file in the docket and shall be made available to all persons who desire to see them. The deposit of such written communications and letters in the file shall not make them a part of the official record of the case.

History: L. 1988, ch. 356, § 356, July 1, 1989.

77-547. Same; administrative proceedings; agency head, defined. For purposes of administrative proceedings of the insurance department under the Kansas administrative procedure act, "agency head" means the commissioner of insurance or the assistant commissioner of insurance, when acting on behalf of the commissioner.

History: L. 1988, ch. 356, § 353, July 1, 1989.

77-548. Director of taxation; adjudicative proceedings; *ex parte* communications; file and docket, contents; technical staff, not party to proceedings. (a) This section applies to adjudicative proceedings before the director of taxation.

(b) (1) After the director has determined and announced that a hearing should be held, and prior to the issuance of a final order, no parties to the proceeding, or their counsel, shall discuss the merits of the matter or proceeding with the presiding officer unless reasonable notice is given to all parties who have appeared to enable the parties to be present at the conference.

(2) After the director has determined and announced that a hearing should be held, prior to the issuance of a final order, copies of any written communications from any party regarding the proceeding that are directed to the presiding officer shall be mailed to all parties of record and proof of service shall be furnished to the director. Communications requested by the director's staff from any party and any written communication received by the director's staff from any party shall be made a part of the file and the docket and shall be made available to all persons who desire to use them,

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provided that the director's requests for information from a party shall be mailed to all parties of record.

(3) The person or persons to whom any *ex parte* communication has been made shall promptly and fully inform the director of the substance of the communication, and the circumstances thereof, to enable the director of any division within the department to take appropriate action.

(c) For purposes of this section, no member of the director's technical staff shall be considered a party to any proceeding before the director, regardless of participation in staff investigations with respect to the proceeding or of participation in the proceeding as a witness. Since the purpose of the staff is to aid the director in the proper discharge of the director's duties, the presiding officer shall be free at all times to confer with any staff member with respect to any proceeding. However, no facts that are outside the record, and that reasonably could be expected to influence the decision in any matter pending before the director, shall be furnished to any presiding officer unless all parties to the proceeding are likewise informed and afforded a reasonable opportunity to respond. Subsection (b) shall apply to staff counsel who have participated in the proceeding in regard to any adjudicatory proceeding before the director.

(d) All letters and written communications that are received by the presiding officer from members of the general public, and that are in the nature of *ex parte* communications, shall be made a part of the file in the docket and shall be made available to all persons who desire to see them. The deposit of such written communications and letters in the file shall not make them a part of the official record of the case.

History: L. 1988, ch. 356, § 357; July 1, 1989.

77-549. Same; application for an order; when proceedings required; agency head defined; final orders. (a) The filing of a return with the director of taxation under article 15, 32, 33, 34, 36, 37, 41 or 47 of chapter 79 of the Kansas Statutes Annotated, and amendments thereto, shall not be deemed an application for an order under the Kansas administrative procedure act.

(b) A determination by the division of taxation or the audit services bureau of the department of revenue concerning tax liability

under article 15, 32, 33, 34, 36, 37, 41 or 47 of chapter 79 of the Kansas Statutes Annotated, and amendments thereto, which is made prior to the opportunity for a hearing before the director of taxation on such tax liability, shall not require an adjudicative proceeding under the Kansas administrative procedure act.

(c) For purposes of the Kansas administrative procedure act, the director of taxation shall be deemed the agency head in regard to orders rendered by the director under chapter 79 of the Kansas Statutes Annotated, and amendments thereto.

(d) Final orders of the director of taxation pursuant to K.S.A. 77-526 and amendments thereto, shall be rendered in writing and served within 120 days after conclusion of the hearing or after submission of proposed findings in accordance with subsection (f) of K.S.A. 77-526 and amendments thereto, unless this period is waived or extended with the written consent of all parties or for good cause shown.

History: L. 1988, ch. 356, § 359; July 1, 1989.

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Law Review and Bar Journal References:

"Administrative Law: The Creation of a Presumption of Unreviewability in Cases of Administrative Inaction (Heckler v. Chaney, 105 S.Ct. 1649 (1985))." Warren F. Frost, 25 W.L.J. 347, 348 (1986).

"The New Kansas Administrative Procedure and Judicial Review Acts." David L. Ryan, 54 J.K.B.A. 33, 35 (1985).

"Medicaid and Long-Term Institutional Care for the Victims of Catastrophic Disabling Illness." Patrick H. Donahue, 36 J.K.B.A. No. 8, 26, 35 (1987).

"Transportation in Transition: KCC Regulation of Motor Carriers into the 1980's." Mary Piper Wattig, 57(5) J.K.B.A. 19, 24 (1988).

"Reappraisal—How Long Will It Last?" Bruce Landeck, 58 J.K.B.A. No. 1, 15, 18 (1989).

Attorney General's Opinions:

Parimutuel racing, refund of deposit of unsuccessful applicant for license; setoffs. 88-120.

CASE ANNOTATIONS

1. Cited, party aggrieved by administrative ruling not free to pick and choose procedure in district court action to avoid administrative remedies. *State ex rel. Smith v. Miller*, 239 K. 187, 190, 718 P.2d 1298 (1986).

2. Venue of appeal to district court from decision of SRS committee is the county where original application for benefits was filed. *Mildfelt v. State*, 11 K.A.2d 617, 618, 619, 620, 621, 731 P.2d 834 (1987).

3. Judicial review unavailable where party fails to exhaust administrative remedies as required by 77-607 and 77-612. *W.S. Dickey Clay Mfg. Co. v. Kansas Corp Comm'n*, 241 K. 744, 751, 740 P.2d 385 (1987).

4. Cited, prohibitions against deductions from employee's wages except as permitted by 44-319 examined. *Escei*

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30-7-64

30-7-64. Definitions. (a) "Appellant" means an individual or entity that has requested a fair hearing from an agency decision affecting the individual or entity.

(b) "Applicant" means an individual who has applied for or requested assistance or benefits from a program administered by the agency.

(c) "Recipient" means an individual who is receiving assistance or benefits from a program administered by the agency. The effective date of this regulation shall be July 1, 1989. (Authorized by K.S.A. 75-3304; implementing K.S.A. 75-3306, as amended by L. 1988, Ch. 356, Sec. 302; effective July 1, 1989.)

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30-7-65 (1)

30-7-65. Notice to recipients of intended action. (a) (1) "Adequate" means a written notice that includes a statement of what action the agency intends to take, the reasons for the intended agency action, the specific policies supporting the action, explanation of the individual's right to request a fair hearing, and the circumstances under which assistance is continued if a hearing is requested.

(2) "Timely" means that the notice shall be mailed at least 10 days before the date upon which the action would become effective.

(b) In cases of intended action to discontinue, terminate, suspend or reduce assistance, the agency shall give timely and adequate notice, except as set forth in section (c) of this regulation.

(c) The agency may dispense with timely notice but shall send adequate notice not later than the date of action when:

(1) The agency has factual information confirming the death of a recipient or of the ADC payee when there is no relative available to serve as new payee;

(2) the agency receives a clear written statement signed by a recipient that the recipient no longer wishes assistance or that gives information which requires termination or reduction of assistance, and the recipient has indicated, in writing, an understanding that termination or reduction of assistance shall be the consequence of supplying the information;

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the recipient has been admitted or committed to an institution, and further payments to that individual are not made by program regulations as long as the person resides in institution;

the recipient has been placed in skilled nursing care, intermediate care or long-term hospitalization;

the recipient's whereabouts are unknown and agency mail sent to the recipient has been returned by the post office stating no known forwarding address. The check shall, however, be made available to the recipient if the recipient's whereabouts become known during the payment period covered by a check;

recipient has been accepted for assistance in a new institution and that fact has been established by the agency;

child is removed from the home as a result of a judicial action, or voluntarily placed in foster care by the legal guardian;

change in level of medical care is prescribed by the recipient's physician;

special allowance granted for a specific period is exhausted and the recipient has been informed in writing at the initiation that the allowance shall automatically terminate at the end of the specified period; or

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30-7-65 (3)

(10) the agency takes action because of information the recipient furnished in a monthly status report or because the recipient has failed to submit a complete or a timely monthly status report without good cause. The effective date of this regulation shall be July 1, 1989. (Authorized by K.S.A. 75-3304; implementing K.S.A. 75-3306, as amended by L. 1988, Ch. 356, Sec. 302; effective July 1, 1989.)

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30-7-66 (1)

30-7-66. Continuation of assistance. (a) If the recipient requests a hearing within the timely notice period as required by K.A.R. 30-7-65, assistance shall not be suspended, reduced, discontinued, or terminated, (but is subject to recovery by the agency if its action is sustained), until an initial decision of the hearing officer is rendered in the matter, unless:

(1) The request for fair hearing concerns the suspension of program payments to a provider or the termination of a provider from program participation;

(2) the request for a fair hearing concerns a discontinued program or service;

(3) a determination is made by the hearing officer that the sole issue is one of federal or state law, regulation or policy, or change in federal or state law, regulation or policy and not one of incorrect grant computation; or

(4) a change affecting the recipient's assistance occurs while the hearing decision is pending and the recipient fails to request a hearing after notice of the change.

(b) The agency shall promptly inform the recipient in writing if assistance is to be discontinued pending the hearing decision.

(c) In any case where action was taken without timely notice, if the recipient requests a hearing within 10 days of the mailing of the notice of the action, and the agency determines that the action resulted from other than the application of federal or

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state law or policy or a change in federal or state law, assistance shall be reinstated and continued until a decision is rendered in the matter except as set forth in (a)(1), (2), (3), or (4). The effective date of this regulation shall be July 1, 1989. (Authorized by K.S.A. 75-3304; implementing K.S.A. 75-3306, as amended by L. 1988, Ch. 356, Sec. 302; effective July 1, 1989.)